EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103292/2020 (V)

Preliminary Hearing Held on Cloud Video Platform
On 26 November 2020
And in chambers 11 December 2020

Employment Judge M Robison

Miss M Deans	**Claimant** **Represented by** **Ms D Atherton** **Lay representative**
Park's of Hamilton (Holdings) Ltd	**Respondent** **Represented by** **Mr C Asbury** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal, having decided that the claim has been lodged out of time, but being satisfied that it was not reasonably practicable to lodge it in time, and that it was lodged within a reasonable time thereafter, finds that it has jurisdiction to hear the claim.

REASONS

1. This is a claim for unfair dismissal. This hearing was listed by CVP to consider the question of time bar. At the hearing Ms Atherton, who is Miss Dean's niece, represented her. Mr Asbury, solicitor, represented the respondent.

2. At the outset of the hearing I queried whether it was necessary to hear evidence as it appeared that there could be no dispute about the relevant factual time line and factual matrix.

3. I advised both parties of the relevant documents which I had on the Employment Tribunal's file. Mr Asbury advised that there were a number of these documents of which he had not had sight, and I read them out to him.

4. Following discussion, Mr Asbury indicated that he thought that it would be appropriate to hear evidence from Ms Atherton (rather than the claimant), and on reflection I agreed. Ms Atherton therefore gave evidence on oath, following which she was cross examined by Mr Asbury.

5. Although I heard oral submissions from the claimant, when it came to submissions from Mr Asbury he requested time to reflect on some of the information which he had become aware of today for the first time. In the circumstances, he was given seven days to lodge written submissions, which were to be copied to Ms Atherton by 3 December 2020. Mr Asbury agreed to attach copies of all authorities he referenced in a format accessible to Ms Atherton.

6. Ms Atherton then was given a further seven days to respond if she thought appropriate, that is she was directed to lodge any written submissions with the Tribunal, and copied to Mr Asbury, by 10 December 2020.

7. Reference was made throughout to documents on the Employment Tribunal file of documents (which were not lodged as productions).

Findings in fact

8. The claimant was employed by the respondent as a payroll administrator from 16 March 2015 until she was dismissed on 9 March 2020.

9. She was assisted in pursuing a claim for unfair dismissal against the respondent by her niece, Ms Atherton.

10. Ms Atherton on behalf of the claimant contacted Acas to notify them of a claim on 29 April 2020. This was notwithstanding the fact that (due to COVID restrictions) an appeal hearing challenging the claimant's dismissal had not been held until 8 May, with the outcome communicated on or around 20 May 2020.

11. An EC certificate with the prospective respondent stated to be Park's of Hamilton (Holdings) Ltd was issued on 11 May 2020.

12. The claimant lodged a claim which was received by the Employment Tribunal on 9 June 2020. The respondent was stated to be Parks Motor Group.

13. That was referred for judicial determination and the claim was rejected because it did not comply with the rules, that is that the name of the respondent on the claim form was different from that on the EC certificate. It was therefore not deemed to be a minor error in name/address in terms of Rule 12(1)(f).

14. By letter dated 11 June 2020, the claimant was advised that her claim had been rejected because it was defective. The letter stated, "you have provided an early conciliation number but the name of the respondent on the claim form is different to that on the EC certificate. I am therefore returning your claim form to you. **Please note that the relevant time limit for presenting your claim has not altered.** You have the right to apply for a reconsideration of this decision under Rule 13. If you want to apply you must do so in writing within 14 days of the date of this letter quoting the pre-acceptance reference number…your application must: explain why you believe the decision to reject your claim is wrong and rectify the identified defect; and say if you wish to request a hearing to consider your application. If you believe that the decision to reject this claim or part of your claim is wrong in law, you may also appeal to the EAT…within 42 days".

15. That letter was sent to the claimant by e-mail dated 11 June 2020 at 09.53. The e-mail advised that the ET1 form would be returned in the post.

16. The claimant immediately sought advice (around 11.30 am on 11 June) by telephoning the ET and also the contact at Acas. She was advised by the Acas conciliator that she had the option of commencing a new EC process but given the certificate was in the correct name, that had already been done, and the respondent had already engaged with the EC process. She decided against that option because she expected the respondent to argue that the EC process had already been completed. She thought an EC certificate could only be used once, so she did not think that it was appropriate to lodge an entirely new claim. Further she was aware of the deadline, and she thought that it would not be sensible to raise a new claim given the time available.

17. She understood from ET staff that e-mailing was a reasonable method of rectifying the error and she understood that was all that she needed to do at the time.

18. Ms Atherton e-mailed the Employment Tribunal on 11 June 2020 at 13.02 as follows, "While I understand why the claim was rejected I believe this is wrong as the Acas early conciliation process has been completed but I have made an error on the tribunal application. I would like to correct an error on my tribunal claim….my claim incorrectly states Miss M Deans as the claimant v respondent Parks Motor Group. This should be corrected to Miss M Deans as the claimant v respondent Park's of Hamilton (Holdings) Ltd. This then matches early conciliation certificate….submitted as part of my claim and to which the respondent has already engaged. Please accept my apologies for this mistake which was made as the letter head on company correspondence received by my aunt Margaret makes reference to Parks Motor Group and the business has a number of individually registered companies and as such I thought that the claim would need to match their correspondence however on checking the correct respondent is the parent company Parks of Hamilton Holdings Ltd as per my Acas notification. I would like to correct the error on my application and request a hearing in order that my application is considered".

19. The claimant received the original ET1 claim form back on or around 16 June.

20. The claimant's e-mail of 11 June was referred for judicial determination and considered as a "reconsideration of ET1 rejection". By letter dated 17 June 2020, the claimant was advised that "your application for a reconsideration of the decision to reject the claim made on 11 June 2020 cannot be considered because you have not rectified the defect identified on the ET1 form. As you have requested a hearing to consider your application we will be in touch in due course with the further details". This was sent by first class post (not e-mail).

21. This was the first time that Ms Atherton became aware that the e-mail sent on 11 June advising how the error was to be corrected was not sufficient to correct the defect. Nor had she at this time yet received any further

correspondence regarding her reconsideration application and request for a hearing.

22. Ms Atherton was not sure what to do to correct the error on the claim form. She was aware that the form having been submitted on line could not be revisited. She thought that it was not appropriate to make corrections to the original ET1 form which had been returned to her on 16 June because it was already date stamped.

23. She was aware that there was a deadline and that it was looming. She discussed this with the claimant and she thought that it was not wise to travel to the Tribunal building in Glasgow to deliver it by hand because of the lockdown rules. In any event, she did not know whether it would be possible to deliver it by hand or whether it would be possible to get a receipt for it. She decided to send in a duplicate form by recorded delivery post, so that she would have a record of having sent it, and of it having been received.

24. She consequently decided to download a blank ET1 claim form and recomplete the form word for word, correcting the error, and adding at section 15 “additional information”, as follows, “Following my email to Glasgow ET dated 11 June 2020 I am resubmitting ET1 form with error/defect corrected and ask for claim to be considered. Please accept apologies for the delay in this”. She noted the pre-acceptance reference.

25. She posted this on 19 June 2020, which was a Friday, recorded delivery. The envelope was date marked as received by the Employment Tribunal on 22 June 2020 (that is the following Monday).

26. Ms Atherton accompanied this with correspondence, also received on 22 June 2020, which stated, “Further to my email dated 11 June 2020, I have enclosed the revised ET1 paperwork to correct the defect on my employment tribunal claim….my original claim incorrectly stated Miss M Deans as the claimant v respondent Parks Motor Group. This should be and had been corrected in the ET1 form enclosed to Miss M Deans as the claimant v respondent Park’s of Hamilton (Holdings) Ltd which matches early conciliation certificate….submitted as part of my claim. The remainder of the claim remains unchanged”. She went on to repeat her apology and explain why the error had been made.

27. The “amended” claim form was treated, in error, for administrative purposes by ET staff as a new claim form, and was not matched with the pre-acceptance file. For this reason, the claimant’s claim was acknowledged in an ET5 standard letter, dated 26 June 2020. The respondent was sent an ET2 notice of claim on the same date and advised that any response had to be received by 24 July 2020.

28. In a separate letter from the ET dated 26 June 2020 the claimant was advised that although her claim had been accepted, it appeared to have been presented outwith the period within which such claims should normally be brought, and the basic law relating to time limits was set out. The respondent was sent a similar letter dated 26 June 2020.

29. By letter dated 16 July 2020 Ms Atherton was advised that a reconsideration hearing would take place and she was asked for dates to avoid. This related to her request in the e-mail of 11 June for a reconsideration hearing regarding the original rejection.

30. The claimant responded to the letter of 16 July 2020 by letter dated 21 July 2020 (received 27 July 2020), giving dates to avoid for the reconsideration hearing, and stating “I also note that the employment judge may decide that reconsideration may take place without a hearing. Please be advised that I provided a written response to the time bar concern on 16 July 2020 not realising that this was something that may be requested later”.

31. This referenced another letter to the ET dated 16 July 2020 (received 22 July 2020) responding to the letter dated 26 June regarding the time limit point, in which she stated, “Firstly I wish to apologise to the Tribunal for the delayed application. I have submitted this application on behalf of my aunt who is the claimant. I am not legally qualified, and as my aunt cannot afford to instruct a solicitor, I offered to help her. I believe that my aunt’s claim was submitted in time and should be accepted by the Tribunal and I will try to set out the reasons for this. I hope that the Tribunal can forgive errors I have made in trying to submit this application.”

32. Under “post-dismissal circumstances”, she stated, “the claimant was formally dismissed from her role with the respondent on 9 March. I hope that it is clear from the content of the ET1 that her dismissal was a shock and was deeply upsetting for her”. She advised that the claimant had raised a grievance and

lodged an appeal and although the respondent had threatened costs at the conclusion of the early conciliation process, after discussing with friends and family and seeking advice from CAB she decided to lodge the claim.

33. She continued, "during this time the UK entered into the COVID19 lockdown which meant it was difficult for me to prepare the ET1 application. It was also at this time that my mother (the claimant's sister) passed away from lung cancer and her funeral took place under COVID restrictions. I hope you will understand this added further difficulties to progressing her Employment Tribunal claim. We prepared the submission week commencing 1 June 2020 and then on realising the word count restrictions I then revised and submitted this on 9 June 2020 via the online application".

34. Under the heading "submission of the ET1", she stated "The Acas early conciliation process began on 29 April 2020 and concluded on 11 May 2020 as the respondent was unwilling to engage following the disciplinary appeal hearing on 8th May 2020. It is therefore my understanding that the final deadline for the submission of the employment tribunal claim was 20th June 2020 calculated by adding the number of days spent conciliating to the three months minus 1 day, following the claimant's dismissal.

I submitted the ET1 to the Employment Tribunal on 9 June 2020 and unfortunately, I had made an error by stating the respondent was "Parks Motor Group" when in fact it should have been Parks of Hamilton (Holdings) Limited. This meant there was a discrepancy between the named party on the conciliation certificate and the ET1.

I received an email on 11 June 2020 from the Tribunal service and notice therein that the application would be returned as we had not complied with the requirement to contact Acas before instituting relevant proceedings due to the error made.

I immediately telephoned Glasgow ET for advice and following the advice given and conscious of the looming deadline I emailed the tribunal service to inform that the requirement had been satisfied, however I had made an error in the application relating to the respondent's name on the ET1 form. I requested to correct the application error so that the claim may be progressed. Then on receiving the returned application in the post I then

corrected the name of the respondent as per my email notification of 11 June 2020 and sent back the paperwork to support the claim.

I take full responsibility for these mistakes and I hope that the Tribunal will understand that I made my best effort to prepare the application and the efforts were due to my lack of expertise in these matters.

I believe strongly that the claimant's claim should be upheld and progressed by the ET and I hope that the information contained therein provided adequate evidence for this belief".

35. Both these responses were referred for judicial consideration, by which time the ET staff had become aware of the administrative error. A letter setting out the position dated 30 July was sent from the Tribunal to the claimant which stated, "Employment Judge Robison has directed that due to an administrative error, the ET1 resubmitted with the error corrected was treated as a new claim form. When that error came to light, the claim was referred to Employment Judge Robison for reconsideration under rule 13. Following reconsideration Employment Judge Robison accepts the claim in full, the defect having been rectified, as of 22 June 2020. The hearing on reconsideration is therefore no longer required". That letter was sent to the claimant, and copied to the respondent's representative by e-mail on 30 July 2020.

36. The claim form and response form were judicially considered, and a standard letter dated 4 August 2020 was forwarded to parties which stated that "Employment Judge Muriel Robison has considered the file and has not dismissed the claim or the response on initial consideration. The claim will now proceed. The Employment Judge has decided that a hearing is to take place in your case. This is a preliminary hearing to decide whether your case can proceed although it was presented late".

37. Parties were asked for their views on this hearing being by CVP. There being no objection to that, this hearing was listed.

Claimant's submissions

38. Ms Atherton made oral submissions at the hearing. She also lodged written submissions in response to Mr Asbury's written submissions. She argued that if the Tribunal does not agree that the claim was submitted on time, then it

was not reasonably practicable to lodge it. She had no reason to believe that the initial ET1 contained an error and if she had been aware it would have been corrected.

39. On the basis of advice from Tribunal staff on 11 June, she understood that e-mail correspondence would be sufficient to correct the error and that the original application could be progressed. As she had not heard back for a number of weeks about her request for a reconsideration hearing, she was not sure how to deal with the error properly.

40. She received two letters dated 26 June, which advised that the ET1 had been accepted, so she believed that matters were progressing. When she got further correspondence on 16 July she realised that she was getting standard letters, and she asked for a reconsideration. Only then did she realise that the corrected ET1 had been treated as a new claim, and that had prompted the time bar rejection, and then the admin error came to light.

41. However, she acted as quickly as she could and within a reasonable time and soon as she realised the errors she corrected them.

42. She had intended to prepare the ET1 in plenty of time but because of lockdown it was difficult to meet her aunt, and they were waiting for copies of correspondence relating to the disciplinary process. Further her mother (the claimant's sister) was admitted to a hospice around this time and died on 31 March 2020. The funeral required to take place under the COVID restrictions, so this was a time when the family were in mourning.

43. They had hoped that it would be resolved at the appeal hearing on 8 May, but they did not hear the outcome until 20 May, when they were advised that the decision was to uphold the dismissal. Then after discussion they came to the view that her aunt should lodge a claim in the Employment Tribunal.

44. Ms Atherton asked the Tribunal to find that the claim had been lodged in time on 11 June, and that the e-mail was sufficient to correct the defect. She submitted that it was sufficient to set this out in an e-mail, relying on *Our Generation Ltd v Aberdeen City Council* 2019 CSIH 42.

45. Upon receipt of the letter of 17 June the claimant's representative felt it would be appropriate to submit an updated ET1 form to make doubly sure the error was corrected. She set about that without delay, as she was aware the deadline would be on or around 20 June. The claimant was not aware that

receipt on Saturday 20 June was not possible, and indeed assumed it would be possible given she understood it was the deadline for submission of the ET1.

46. Otherwise the Tribunal should find that it was not reasonably practicable to lodge it in time, because the claimant believed that a correct ET1 had been submitted and the error corrected. However the claimant only became aware of the specific error in the ET1 on receipt of the letter dated 17 June 2020. Ms Atherton relied on *Adams v BT*, a decision of the EAT. Here there was an error in recording the EC certificate number. The claim was lodged two days out of time. The EAT found that the Employment Judge had erred in treating the fact the first claim was in time as meaning that a second claim could have been presented in time. The focus should have been on the second claim and whether there was any impediment to timely presentation of that claim. She argued that in this case the error made was also a minor one due to the confusion caused by the respondent's references to Parks Motor Group on all publicity and correspondence.

47. For these reasons, the claimant submits that the ET1 should be accepted out of time as not to do so would be prejudicial to the claimant.

Respondent's submissions

48. As discussed above, Mr Asbury was permitted time to lodge written submissions. He set out the issues for determination by the Tribunal, and the relevant provisions of the ERA, as well as a time line of key events.

49. Relying on *Consignia plc v Sealy* [2002] EWCA Civ 878, he argued that the claimant's claim had been presented outwith the normal time limits. This is on the basis that the form was posted first class special delivery on 19 June 2020, and received by the Tribunal on 22 June 2020, that is two days after the expiry of the limitation period. The ordinary course of post rule deems service to have taken place on the second day after first-class posting, excluding Sundays. Saturdays are included. The fact that the time limit expired on a Saturday does not entitle the claimant to assert that the time is extended to the next working day because the rules relating to limitation periods are set out in statute as opposed to the Employment Tribunal rules (*Miah v Axis Security Services Ltd* UKEAT/0290/17).

50. Mr Asbury argued that the claimant cannot rely on the fact that the claim was lodged, albeit with an error, on 9 June and the error revised on 11 June. This is because the decision not to accept the reconsideration application on 11 June 2020 was correct, the claimant not having returned the rectified claim form until 19 June, with the claim being accepted and the defect having been rectified as at 22 June 2020.

51. Mr Asbury then argued that it was reasonably practicable for the claimant to have lodged the claim in time, relying on *Porter v Bandridge Ltd* [1978] IRLR 271 and *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119, that the relevant test is one of reasonable feasibility. He distinguished the case of *Adams v BT* [2017] ICR 382, that claim relating to a minor error of which the claimant was advised after the expiry of the limitation period.

52. He submitted that from 11 June to the expiry of the limitation period on 20 June, the claimant knew that the initial claim form had been rejected and she knew that she was required to take action to remedy this prior to the expiry of the limitation period. He argued that there was no impediment which could mean that it was not reasonably practicable to submit a new claim, or indeed a fully compliant application for reconsideration and rectification within the limitation period. The rejected claim form was received by the claimant on Tuesday 16 June and the claimant's representative accepted that there was no impediment to her posting the corrected claim form to the Tribunal on 16, 17 or 18 June. She knew of the rejection and how to rectify the defect and she knew of the limitation period and the importance of adhering to that limitation period. Had she posted the corrected claim form on 16, 17 or 18 June 2020, then her claim would most likely have been received within the limitation period, and with reference to the postal rule, by 20 June at the latest.

53. While the claimant's representative decided against driving to Glasgow to hand deliver it, she chose to physically go to the post office exposing herself to the same risks. She should have known that posting it would mean that it was extremely unlikely that it would have reached the Tribunal before the expiry of the limitation period. It was not reasonable for the claimant to rely on

the postal service in these circumstances (*Lawrence v Yesmar Restaurants* ET Case No 1302367/15).

54. The claimant also knew of the option of using online submission but understood the advice from Acas that this was not possible. This however was the most obvious route to use to correct the claim. She knew where to get advice but chose not to. She could have consulted a solicitor or CAB. It is not reasonable for her to plead ignorance of the relevant rules or the options open to her.

55. With regard to the rule 13 reconsideration provisions, he argued that the claimant did not submit a fully compliant application for reconsideration and rectification within the limitation period, and it was reasonably practicable for her to have submitted a new claim or application for reconsideration by 20 June.

56. With regard to Ms Atherton's claim that she was not aware of the statutory time limit for bringing the claim, relying on the *Porter* case, he argued that she ought to have been aware of it, having gone through the Acas EC procedure. She was advised by the ET that the time limit had not altered. While not legally qualified, the claimant's representative is clearly an intelligent and capable professional person who was aware of the time limit and its importance and knew action had to be taken before its expiry and had been advised by the Tribunal what to do in order to submit a compliant reconsideration application.

57. Mr Asbury then argued, relying on *Royal Bank of Scotland v Theobald* UKEAT/0444/06, that if the Tribunal found that it was not reasonably practicable to have lodged the claim in time that it was not presented within such further period as was reasonable, the claimant having failed to provide a "full and frank" explanation of events in the events in the period between the expiry of the time limit and the submission of the claim.

58. Finally he submitted, relying on *Beasley v National Grid* 2008 EWCA Civ 742, that time limits were to ensure that parties know where they stand within a set period of any dispute arising, and that the respondent would be prejudiced by the delay if the claim were allowed to proceed out of time.

The relevant law

59. The law relating to time limits in respect of unfair dismissal is contained in the Employment Rights Act 1996. Section s111(2) states that an employment tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the effective date of termination or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

60. Where the claim is lodged out of time, the tribunal must consider whether it was not reasonably practicable for the claimant to present the claim in time, the burden of proof lying with the claimant. If the claimant succeeds in showing that it was not reasonably practicable to present the claim in time, then the tribunal must then be satisfied that the time within which the claim was in fact presented was reasonable.

61. The Court of Appeal has recently considered the correct approach to the test of reasonable practicability (*Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490). Lord Justice Underhill summarised the essential points as follows:

    1. The test should be given "a liberal interpretation in favour of the employee" (*Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ 479, which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53);
    2. The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119….
    3. If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will [not] have been reasonably practicable for them to bring the claim in time (see *Wall's Meat Co Ltd v Khan* [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are

reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made;

4. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (*Dedman*)…
5. The test of reasonable practicability is one of fact and not law (*Palmer*).

Tribunal decision

62. It is not disputed that the claimant's employment ended on 9 March 2020. That therefore is the effective date of termination and the date from which any time limit should run. Ordinarily, the time limit would expire on 8 June 2020, but the claimant commenced early conciliation on 29 April 2020. The early conciliation period lasts until Acas issue the EC certificate, which in this case was on 11 May 2020. This gives the claimant the benefit of a 12 day extension to the limitation period, which would thus expire on 20 June 2020. The claim should therefore have been lodged by 20 June 2020. There is no dispute about this.

Was the claim lodged in time?

63. Based on these facts, the respondent argues that the claim was presented out of time. The claimant's representative posted the form on 19 June 2020, having rejected other options. That was in the knowledge that there was a time limit looming, although without being clear about the specific date of expiry of the time limit, or the relevance of week-ends.
64. While I accept that Ms Atherton did not realise the significance of her actions, had she posted the form on 18 June or chosen to drive into Glasgow to hand in the form on 19 June, the corrected claim form would have been lodged in time. However I accept that I require to apply the "ordinary course of post" rule, discussed in the *Consignia* case. I therefore accept Mr Asbury's submission, that the claim has been lodged two days out of time.
65. I agreed with Mr Asbury that it could not be said that the fact that claimant had corrected the error by 11 June meant that the claim was lodged in time on that date. Nor did I take the view that because the original error was

described by the claimant as a minor one, explained by a clear rationale, that meant that it should be treated as in time. I did however consider that these facts were relevant to the next question regarding reasonable practicability.

Was it reasonably practicable for the claimant to present her claim in time?

66. I accept that the burden of proof is on the claimant, and that following *Palmer* the test is whether it was "reasonably feasible" for the claim to have been lodged in time.

67. However this question has recently been considered by the Court of Appeal in the case of *Lowri* and five guiding principles from previous case law have been identified, as set out above.

68. I therefore bear in mind that the test should be "given a liberal interpretation in favour of the employee"; that reasonably feasible means more than simply physical impracticability; and that where a time limit is missed because of ignorance of its existence or a mistake about when it expires, then the question I must consider is whether that ignorance is reasonable. In this case, intelligent, capable and professional as Ms Atherton was, she was not a skilled adviser. Further, the matter is a question of fact, and not law.

69. In this case the claim was initially lodged within the time limit. Ms Atherton explained that they had lodged it later than intended, because they were awaiting the outcome of the appeal which they had hoped would have resolved matters. She explained that around this time the family were dealing with a bereavement and operating under lockdown rules, which caused inevitable delay. In other circumstances they could have lodged the claim sooner, which might have allowed more time to correct any errors. However, even if it could have been lodged sooner, the fact is that the claim was initially lodged in time. As is clear from the *Adams* case, that fact is not however an answer to the reasonable practicable question.

70. The claim did however contain a crucial error. I considered the original claim form and I rejected it in terms of the rules. This was because, in terms or rule 12(1)(f), the name of the respondent on the EC certificate did not match the name of the respondent on the claim form.

71. I considered at the time that it was not a minor error. The relevant rule, at the time of my decision, was as follows, "The claim….shall be rejected if the

judge considers that [it]….is of a kind described in sub-paragraph…(f)…unless the judge considers that the claimant made a minor error in relation to a name…and it would not be in the interests of justice to reject the claim".

72. It is interesting to note that since that decision the Employment Tribunal rules have changed, with the changes coming into force on 8 October 2020. In particular rule 12(2A) is amended by section 7(c) of the Employment Tribunal (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020, which states that in rule 12, at para 2A, "minor" is deleted.

73. This now means that the error does not need to be a minor one for a claim to be allowed to proceed at that stage. I have no doubt that had those new rules been in force I would not have rejected this claim, because given the type of error it was, I would have considered that it was not in the interests of justice to reject the claim.

74. I could not say, however and do not say on reflection, that the error which the claimant made could be described as minor, and it was rejected in accordance with my usual practice.

75. The claimant's representative had a plausible explanation for the error, but that is nothing to the point. She acted very quickly in an attempt to correct the error, which she did in the e-mail dated 11 June. That was, in accordance with the rules, referred to me as a reconsideration under rule 13. However that had to be rejected on reconsideration because although the error was explained and corrected in the e-mail, the corrected claim form had not been returned. It was to be returned to the claimant by post on 15 June.

76. In fact the claimant did not receive the returned claim form until 16 June at the earliest, and perhaps not until 17 June. However and in any event she was not aware of the requirement to return the corrected claim form as well until she received the letter explaining this which was itself dated 17 June and sent by post, which advised of the requirement to return the form with corrections.

77. It should be noted that, contrary to Mr Asbury's submissions, although he may not have known this, the claimant was not in fact advised in terms of the requirement to return the claim form with the error corrected. I have set out

the terms of the letter she received at length in the findings in fact, and it is significant that this is not stated as one of the required actions. I am therefore prepared to accept Ms Atherton's evidence that when she contacted Tribunal staff on 11 June, she was at the very least given the impression that it would be sufficient to correct the error by sending in an e-mail.

78. It should be noted that the requirement to return the corrected form is not stated in terms in the rules – rule 13 simply states that in a reconsideration of a rejection a party shall "rectify the defect". Of course what a party might not realise is that rectifying the defect by e-mail when the original claim form has been returned to them means that strictly speaking there is no valid claim form presented to the Tribunal (although a copy is in fact retained on the pre-acceptance file). (I should say in passing that the decision in the *Aberdeen City Council* case which the claimant cited is not in point when we are dealing with the Employment Tribunal rules).

79. Indeed, it was precisely because a large number of claimants had not been returning the claim form with their corrections, and because it appeared that even Tribunal staff were not certain of the requirement, that the letter which is sent out returning the claim form was amended to include the following –

> "You have the right to apply for a reconsideration of this decision under Rule 13. If you want to apply you must do so in writing within 14 days of the date of this letter quoting the pre-acceptance reference number shown above. Your application must:
>
> - Explain why you believe the decision to reject your claim is wrong or confirm that you have rectified the identified defect in your form
> - Include your claim form (amended, if necessary, to rectify the defect)
> - Say if you wish to request a hearing to consider your application".

80. That change in practice occurred from 14 July 2020, that is around a month after the claimant was advised of the steps to take to rectify the error.

81. The earliest the claimant became aware of the need to return the form itself was 18 June. (It is clear from the Tribunal file that the letter was posted out first class on 17 June and not sent by e-mail). Until that point in time, she believed that her email to the ET notifying them of the error was sufficient, and she thought that she had rectified the error and that her claim was progressing. She had requested a hearing, and not heard back about that.

She thought she might get further correspondence advising her to address the matter more formally since she knew she could not correct the claim form on line.

82. Following receipt of that e-mail, she clearly had to discuss matters with her aunt, whom she was representing.

83. Although I accept that in response to a question from Mr Asbury Ms Atherton said that she could have returned the form on 16, 17 or 18 June, and that is of course theoretically correct, in fact she was not specifically made aware of the need to return the form until 18 June.

84. Ms Atherton did consider the possibility of lodging another form on-line. Although she spoke to Tribunal staff, that does not appear to be their advice (rightly since there is a possibility in some circumstances (although not here) that on reconsideration the first claim form could have been accepted as at the date it was originally presented which is significant for time limit purposes). She also spoke to her contact at Acas. Although I did not understand Ms Atherton to say, as Mr Asbury did, that Acas had said that it was not possible, she thought it better not to re-start the EC process and was under the impression that the EC certificate could only be used for one claim. She thought that it was better with the deadline "looming" not to start the process again.

85. She did consider driving into Glasgow to hand-deliver the corrected form. It is relevant that we were still in national lock-down at the time, and it is natural that she hesitated about driving in. But she was also not sure if the Tribunal office was open, whether there was a skeleton staff, who the right person to pass the form to might be, or importantly whether she could get a receipt for it since it was crucial that she would be able prove that she had handed it in.

86. After reflecting on her options, she decided to post the amended claim form first class recorded delivery, to ensure that she had confirmation of posting and that there would be confirmation of receipt.

87. I bear all of this in mind when I consider whether it was "reasonably feasible" for the claim to have been lodged in time.

88. I also take account of the claimant's representative's knowledge of time limits. While Ms Atherton was aware that there was a time limit, had an awareness of when that would expire (and now fully understands the

situation), was aware that it was “looming”, was aware that time limits had not altered notwithstanding the error on the form, I accept that she was mistaken or ignorant about the specific date on which the time limit would expire.

89. I am directed by Lord Justice Underhill in *Lowri* as discussed above, to assess whether the ignorance or mistake was reasonable, taking account of any enquiries which the claimant or their advisor should have made. In *Adams v BT*, Simler P. (as she then was) referring to the *Walls Meat Co* case, stated that “the focus is on the claimant’s state of mind viewed objectively”.

90. In this case, it is accepted that the time limit expired on 20 June 2020. This is because of the extension as a result of the early conciliation regime which impacts on the normal time limits. In fact the regime in regard to how many days extension is allowed is relatively complex (as set out in the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014).

91. Ms Atherton was aware that the time limit was “looming” but she said that she was not 100% sure what the actual date of the deadline was. She said in particular that she did not appreciate the significance of what a time limit falling on a week-end was, exactly how calendar months were calculated and how the number of days was counted. She made a judgment but at the time she was not sure about it. It was only when she did research after 16 July that she realised that Saturdays did not count.

92. She accepted that she could have consulted a CAB but she was not sure whether they could help with that level of detail, and although she knew that she could get legal advice that was cost prohibitive. She had consulted both the ET staff and her Acas contact but neither made it clear to her what she required to do and when.

93. I find that her mistake or ignorance with regard to the specific date on which the time limit expired was reasonable for the following reasons.

94. The question of the implications of posting and time limits falling on a week-end and, as HHJ Eady pointed out in the *Miah* case, the practical difficulties of presenting a claim on a non-working day, have been acknowledged in previous case law. The implications are not self-evident. A party (especially one represented by a non-legally qualified person) might reasonably believe

that a letter posted first class recorded delivery would arrive the very next day. They might reasonably believe that it would be in time if it arrived on the Saturday when the time limit fell, or indeed that the Saturday did not count, and that it would be in time if it arrived on the Monday (as it did in this case).

95. Indeed, if it was the ET rules which were to be relied upon, then the Saturday would not count. Rule 90 states that, "Where a document has been delivered in accordance with rule 85 or 86, it shall, unless the contrary is proved, be taken to have been received by the addressee (a) if sent by post, on the day on which it would be delivered in the ordinary course of post". However, this is to be read with Rule 4(2) which states that, "If the time specified by these Rules, a practice direction or an order for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day. "Working day" means any day except a Saturday or Sunday…."

96. I accept Mr Asbury's submission that the rules relating to limitation periods are a matter of statute and not these procedural rules which apply to Employment Tribunal proceedings. However, I take the view that this adds complexity to the question about the specific date a time limit expires when it might fall on a non-working day. This complexity supports my view that the claimant's ignorance or mistake was, in this case, reasonable.

97. I conclude therefore given the facts of this case, that it was not reasonably practicable for the claimant to have lodged her claim in time.

Was the claim form submitted within such further period as the Tribunal considers reasonable?

98. The next question I must consider, which is stage two of the test, is whether any delay in submitting the claim form was reasonable.

99. I had no hesitation in concluding that the claim form was submitted within a reasonable time thereafter. I entirely reject Mr Asbury's suggestion that the claimant has failed to provide a "full and frank" explanation of events between the expiry of the time limit and the submission of the claim.

100. In fact here the claimant had actually rectified the defect and posted a valid claim within the time limit, and it is only the vagaries of the rules, and principles from case law, which meant that it was taken to have been received after the time limit expired.

Balance of prejudice

101. Mr Asbury argues that the respondent would be prejudiced by the delay if the claim were allowed to proceed. As I understand it, he argues that simply based on the fact of the respondent not being allowed to rely on strict time limits enacted by Parliament.

102. In so far as the question of the balance of prejudice is a relevant consideration (in a case where the test is not just and equitable considerations), again I wholly reject that suggestion. In the circumstances of this case, the late lodging of the corrected claim form made no difference whatsoever to the progress of this claim. Had the claimant handed in the claim form on Friday 19, it would not have been dealt with before 22 June, and even if the claimant had posted it to arrive on Friday 19, it is highly unlikely that it would have been dealt with by Tribunal administration on that date, even though it would have been lodged in time.

103. As it happens we know exactly when the claim form would have been dealt with in the normal course of events, because when the form arrived on 22 June it was treated as a new claim form, and the standard response letter sent out on 26 June 2020. Thus the fact that the claim was received after the expiry of the time limit made no difference at all to the progress of the claim. Indeed, had it been treated as a correction to a previously submitted ET1 it is likely to have taken longer for administrative staff to deal with. The claimant's request for a reconsideration hearing (which is her right to request) was not dealt with until 16 July 2020.

104. Thus any delay had no impact on the respondent, but the claimant would otherwise be deprived of the right to bring this claim. Thus I conclude, in so far as I am required to, that the balance of prejudice favours allowing the extension of time.

Conclusion

105. This claim is lodged out of time. For the reasons set out above I am however satisfied that it was not reasonably practicable to lodge the claim in time, and that the claim form was lodged within a reasonable time thereafter. The Tribunal does therefore have jurisdiction to hear the claim.

106. **A final hearing will now require to be listed. Date listing letters should now be issued** allowing parties to identify their availability, their witnesses and their estimated number of days that it will be required to hear the case.

Employment Judge: Muriel Robison
Date of Judgment: 15th December 2020
Entered in Register: 23rd January 2021
Copied to Parties